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## BEFORE THE POSTAL REGULATORY COMMISSION WASHINGTON, D.C. 20268-0001

REGULATIONS PERTAINING TO 39 U.S.C. § 601

Docket No. RM2020-4

## COMMENTS OF THE UNITED STATES POSTAL SERVICE IN RESPONSE TO ORDER NO. 6047

(January 3, 2022)

On November 24, 2021, the Commission issued Order No. 6047, a notice of proposed rulemaking regarding the Commission's rulemaking authority under 39 U.S.C. § 601(c). As Order No. 6047 makes clear, the Commission's measured approach to the proposed rules is informed by substantial comments in this proceeding and in Docket No. Pl2021-2 attesting to the lack of public interest in changing the location or substance of the existing regulations relating to Section 601. The proposed rules also reflect the Commission's accurate understanding—contrary to the wishes of a distinct minority of commenters—that Congress did not delegate to the Commission the power to change the substantive scope of Section 601, let alone the letter monopoly more broadly. In these regards, the Postal Service is in full agreement with the Commission's interpretation as reflected in the proposed rules.

A few aspects of the proposed rules warrant refinement, however. For the most part, these recommendations are aimed at dispelling potential confusion about the scope of the Commission's authority, which extends only to Section 601 and not to other aspects of the Private Express Statutes or 39 C.F.R. Part 310.

Proposed Rule 3065.1(a): "The rules in this part implement 39 U.S.C. 601, which generally describes when letters may be carried out of the mail."

As drafted, this provision characterizes Section 601 as "generally describ[ing] when letters may be carried out of the mail." This suggests that Section 601 is the sole authority that does so, notwithstanding the Title 18 Private Express Statutes, which also describe when letters may be carried out of the mail. It would be more accurate to refer to "39 U.S.C. 601, which generally describes certain circumstances in which when letters may be carried out of the mail."

Proposed Rule 3065.1(b): "Notwithstanding placement in Postal Service chapter I, the following provisions in parts 310 and 320 of this title are within the scope of this part and the Commission has the authority to interpret them:

- "(1) 39 C.F.R. 310.1;
- "(2) 39 C.F.R. 310.2(b)(1)–(2); and
- "(3) 39 C.F.R. 320.1-320.8."

As drafted, this provision suggests that the entirety of the definitional rules in 39 C.F.R. § 310.1 is within the Commission's authority under Section 601(c). Order No. 6047 explains that the Commission took this approach because 39 U.S.C. § 601(b)(3), which codifies the Postal Service—created administrative exceptions to the letter monopoly, refers to 39 C.F.R. § 310.1 without further specificity. Order No. 6047, Notice of Proposed Rulemaking for Regulations Pertaining to Section 601, PRC Docket No. RM2020-4 (Nov. 24, 2021), at 17. But Congress's cross-reference to 39 C.F.R. § 310.1 is not unqualified: to fall within the scope of Section 601(b)(3) and the Commission's authority, the relevant regulations must "purport to permit private carriage by suspension of the operation of this section (as [in effect on July 1, 2005])." 39 U.S.C. § 601(b)(3). And indeed, a claim of purported suspension existed in connection with 39 C.F.R. § 310.1 as of July 1, 2005—but that claim was expressly limited to paragraph (a)(7) and did not extend to any other aspect of the section. 39 C.F.R. § 310.1(a)(7)

note (2005). The regulations do not characterize any other aspect of 39 C.F.R. § 310.1 as a purported suspension.

The relevant statutory text supports a delimited construction of Section 601(b)(3)'s reference to 39 C.F.R. § 310.1. The phrasing of Section 601(b)(3) frames "purport" as an active verb, which implies that something about the regulations' text must do the work of claiming to suspend Section 601. Moreover, the express claim of suspension as to 39 C.F.R. § 310.1(a)(7) is on par with the express suspensions in 39 C.F.R. §§ 320.2–.8, which Congress referenced in the same parenthetical of Section 601(b)(3). Therefore, the statutory text demonstrates that these expressly claimed suspensions are what Congress had in mind in describing "regulations of the United States Postal Service . . . that purport to permit private carriage by suspension of the operation of this section." See, e.g., ICC v. Texas, 479 U.S. 450, 458 (1987) (Congress is presumed to be aware of preexisting regulatory interpretation when it incorporates a term into legislation). Accordingly, despite Congress's use of a sectionlevel cross-reference, the plain text of Section 601(b)(3) makes clear that Congress intended only for the expressly purported suspensions in paragraph (a)(7), and not other provisions of the section that make no such claim, to enter the Commission's regulatory purview under 39 U.S.C. § 601.

Moreover, the Section 601(b)(3) criterion provides that a covered rule must "purport to permit private carriage by suspension of the operation of this section." Paragraph (a)(7) is the only portion of 39 C.F.R. § 310.1 that meets this standard. In

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<sup>&</sup>lt;sup>1</sup> Order No. 6047 offers no explanation of why any other provision of 39 C.F.R. § 310.1 would qualify as "purport[ing] to permit private carriage by suspension of the operation of [Section 601]," and it is not immediately apparent how any other such provision could qualify, let alone all of them.

most other regards, 39 C.F.R. § 310.1 purports not to <u>permit</u> private carriage, but to define the terms on which private carriage is <u>prohibited</u>. *See, e.g.*, 39 C.F.R. § 310.1(a)(3) (explaining when a message is "directed to a 'specific person or address'," such that private carriage is prohibited); *id.* at (a)(4) (listing examples of recording methods used in messages for which private carriage is prohibited); *id.* at (d) (listing examples of "post roads" on which private carriage is prohibited). While these provisions might admit of negative inferences about circumstances in which private carriage is not prohibited, that does not rise to the level of "purport[ing] to permit private carriage by suspension of the operation of" Section 601.

Only two provisions outside of paragraph (a)(7)—subparagraphs (a)(1)(i) and (ii)—exclude certain objects from the definition of a "letter" and therefore could be said to permit private carriage. In substance, however, those two provisions merely state items that are self-evidently not letters in the first place, in terms of their unsuitability for serving as letter-type communications media. By contrast, and as acknowledged by the footnote to 39 C.F.R. § 310.1, paragraph (a)(7) consists of items that do meet the primary definition of a letter (messages recorded in tangible objects), but that are carved out for essentially policy reasons. As that footnote makes clear, paragraph (a)(7) permits private carriage "by suspension of the operation of" the otherwise-applicable postage-payment requirement in Section 601; subparagraphs (a)(1)(i) and (ii) cannot fairly be said to do the same.

The draft rule seems to imply that the Commission is entitled to exercise interpretive authority as to other definitions in 39 C.F.R. § 310.1, to the extent that they define terms used in connection with Section 601. But the same definitions bear on

regulations concerning the operation of statutes over which Congress deliberately refrained from conferring rulemaking authority to the Commission—namely, the remainder of 39 U.S.C. Chapter 6 and the Title 18 Private Express Statutes. See Comments of the United States Postal Service in Response to Order No. 5422, PRC Docket No. RM2020-4 (Apr. 7, 2020) [hereinafter "Postal Service ANPR Comments"], at 2–3; see also 39 C.F.R. §§ 310.2(a), 310.3–.5 (implementing the prohibition and exceptions in 18 U.S.C. §§ 1693–1699). Because the 39 C.F.R. § 310.1 definitions are used in the context of authorities both within and beyond the Commission's purview, purporting to include them within the scope of the Commission's Section 601(c) rulemaking authority would risk overreach.

For these reasons, the Postal Service recommends altering proposed Rule 3065.1(b)(1) to read "39 C.F.R. 310.1(a)(7);".

Proposed Rule 3065.2(a)–(b): "(a) The Postal Service may not promulgate any new regulations, issue guidance, or enter into agreements purporting to suspend or otherwise define the scope of the letter monopoly. "(b) The Postal Service may not promulgate any new regulations or issue guidance purporting to interpret 39 U.S.C. 601."

As drafted, proposed Rule 3065.2(a) raises at least two issues. First, it is unclear what is envisioned by the reference to "agreements purporting to suspend or otherwise define the scope of the letter monopoly." Contracts typically do not purport to define the operation of a statutory scheme, but they inevitably reflect the parties' shared understanding (absent any more authoritative ruling) about the relevant legal backdrop and the parties' rights—including, in some cases, whether certain activities are reserved to the Postal Service. Without further qualification, then, the sweep of the proposed rule could usurp the Postal Service's delegated authority to enter into contracts and to settle

claims, including, potentially, claims for unpaid postage or damages resulting from violations of the Private Express Statutes. 39 U.S.C. § 401(3), (8). The proposed rule could also be viewed as at tension with 39 C.F.R. § 310.2(b)(2), which expressly permits certain agreements and which the Commission apparently views as a purported suspension that is now codified by Section 601(b)(3). See Order No. 6047 at 21 (proposed Rule 3065.1(b)(1)); Comments of the United States Postal Service in Response to Order No. 5930, PRC Docket No. Pl2021-2 (Aug. 26, 2021), at 4–5.

Second, proposed Rule 3065.2(a) and (b), as drafted, would bar the Postal Service from "issu[ing] guidance" on the letter monopoly or Section 601. This goes beyond Section 601's grant of rulemaking authority to the Commission. Although that grant, in conjunction with the changes to Section 401(2), indicates a deprivation of the Postal Service's former rulemaking authority regarding these matters, it in no way preempts the Postal Service's ordinary ability to offer its views—binding or not—on any aspect of postal laws (or, indeed, any other topic). Yet the proposed rule could suggest that the Postal Service would be barred from doing so in the course of Commission proceedings, informal correspondence and discussions, litigation, or other activities in the ordinary course of business, to the extent that such views could be characterized as "guidance" on the letter monopoly. Such a unilateral handicap would be unwarranted by any statutory authority and is unlikely to be what the Commission had in mind.

The simplest method to remedy these issues would simply be to delete proposed Rule 3065.2(a) and (b) and to retitle proposed Rule 3065.2 accordingly. Indeed, subsections (a) and (b) are fundamentally unnecessary in light of subsection (c), which more succinctly and accurately conveys the scope of the Commission's Section 601(c)

authority—namely that the "Commission has the sole authority to promulgate new regulations necessary to carry out 39 U.S.C. § 601." By characterizing the Commission's authority as "sole," it goes without saying that the Postal Service lacks rulemaking authority. And the lack of rulemaking authority would naturally inform the weight to be accorded to whatever interpretive views that the Postal Service might espouse. Thus, proposed Rule 3065.2(c) adequately contains the apparently intended essence of subsections (a) and (b), without the complicating implications that such would-be restatements would bring.

Thus, the Postal Service recommends that proposed Rule 3065.2 be amended as follows:

- § 3065.2 Prohibition on new regulations. Rulemaking authority.
- (a) The Postal Service may not promulgate any new regulations, issue guidance, or enter into agreements purporting to suspend or otherwise define the scope of the letter monopoly.
- (b) The Postal Service may not promulgate any new regulations or issue guidance purporting to interpret 39 U.S.C. 601.
- (c) The Commission has the sole authority to promulgate new regulations necessary to carry out 39 U.S.C. 601.<sup>2</sup>

This clear, concise approach would adequately express the intended points without overstepping the scope of the Commission's delegated authority. It would also be simpler than attempting to address the issues above via revisions to subsections (a) and (b) and interpretive notes.

In conclusion, the Postal Service agrees with the Commission's maintenance of

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<sup>&</sup>lt;sup>2</sup> If the Commission so desires, it could add a clarifying note along these lines: "The Commission's rulemaking authority does not extend to the promulgation, deletion, or modification of exceptions established by 39 U.S.C. 601."

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the *status quo* location and content of the longstanding regulations that Congress codified. With respect to the Commission's additional proposed rules, however, further refinement is needed to avoid misimpressions as to the limited scope of the Commission's delegated authority to regulate under Section 601.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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